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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF MARYLAND,

Petitioner,

v.

RONALD GENE WATTERS,

Respondent.

Petition For A Writ Of Certiorari
To The Court Of Appeals Of Maryland

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where, without the trial judge's knowledge, the general public is excluded from voir dire and jury selection at a morning session of court, but the trial itself is open to the general public, is a criminal defendant's Sixth Amendment right to a public trial violated?

PARTIES

The caption contains the names of all the parties below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Watters v. State,* 328 Md. 38, 612 A.2d 288 (1992), reversing Respondent's conviction, is reproduced in Appendix A (1a-11a).

The reported opinion of the Court of Special Appeals of Maryland, *Watters v. State,* 84 Md. App. 230, 578 A.2d 810 (1990), affirming Respondent's conviction, is reproduced in Appendix B (12a-24a).

The unreported ruling of the Circuit Court for Wicomico County is reproduced at page 4 herein.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland reversing Respondent's conviction was filed on October 2, 1992. This petition is filed within ninety days of that judgment, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Respondent Watters was convicted of the first degree murder of Lisa Renee Taylor, a 19-year-old college student at Salisbury State University on the Eastern Shore of Maryland. (T. 9/25/89 at 170, 172). Taylor disappeared one evening in June, 1988, after leaving her part-time job at a pharmacy and stopping by her mother's house. (*Id.* at 172-75). Her badly decomposed body was not found until almost four months later. She had been suffocated with the blue

pharmacy smock that she had worn at work, which had been stuffed into her mouth and shoved down her throat into her larynx. (*Id.* at 175-76; 13a). The discovery of the victim's body and the subsequent criminal proceedings against Watters generated substantial media attention in the small community of Salisbury. (1a).

On the morning of September 25, 1989, a large number of potential jurors were assembled for voir dire.[1] Concerned about security and the capacity of the courtroom, a deputy sheriff unilaterally decided to exclude everyone from the courtroom during jury selection except for the venire panels and the witnesses in the case. (T. 9/25/89 at 152-56). The voir dire and selection of jurors was accomplished that morning, after which the court recessed for lunch. (*Id.* at 146, 148-49). Upon returning from the lunch recess, defense counsel informed the court that he had just learned that members of the general public had been excluded from the courtroom that morning. (*Id.* at 150-51). Defense counsel moved for a mistrial, arguing that Watters had been denied his constitutional right to a public trial. (*Id.* at 150-52). The trial court immediately held a hearing on Watters's motion.

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[1] The record before the Maryland Court of Appeals did not reflect the exact number of venirepersons, but did show that 81 of them answered questions during voir dire. (T. 9/25/89 at 4-144). Pursuant to a local administrative order designed to protect venirepersons' privacy, the juror panel lists were not transmitted to the Maryland appellate courts, but were retained in the circuit court clerk's office. Those panel lists have now been filed in the record in this case, (R. 448-55), and reflect that a total of 96 venirepersons were assembled for Watters's trial.

Deputy Sheriff T.A. Phillips, who was in charge of courtroom security, testified that he had instructed another deputy to allow no one in the courtroom during jury selection other than the venire panels and the witnesses in the case. (*Id.* at 152, 153-56). He did so because he believed that the courtroom was not large enough to accommodate all of the people who wanted to gain access to it. (*Id.* at 155-56). Although Deputy Phillips stated that there were "some seats" available, he could not estimate the number. (*Id.* at 156). Watters's mother, Lillian Trotter, testified that she, her aunt, and her two sisters had been denied access to the courtroom that morning. (*Id.* at 157-59). Ms. Trotter confirmed that only prospective jurors and witnesses had been allowed into the courtroom. (*Id.* at 158). Defense counsel also proffered that a Linda Grasso had been excluded from the courtroom; Grasso's relationship to the case was never established. (*Id.* at 159).

After presenting the testimony of Deputy Phillips and Ms. Trotter, defense counsel argued that Watters's right to a public trial had been denied. The trial court disagreed, ruling, "No it hasn't. It was done as a matter of Court security because of the crowded conditions of the courtroom, and it is not denying him his right to a public trial. The motion is denied." (*Id.*).

From opening statements and throughout the remainder of the proceedings, the courtroom was open to the general public.[2] At the conclusion of a three-

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[2] A pre-trial hearing on Watters's motion to suppress the incriminating statements he had made to the police likewise had been open to the public. (T. 8/24/89).

day trial, Watters was found guilty of first degree murder and related crimes. (T. 9/27/89 at 471-72). A month later, Watters was sentenced to a term of life imprisonment without the possibility of parole. (T. 10/27/89 at 30).

On appeal, the Court of Special Appeals of Maryland upheld the trial court's ruling. The state's intermediate appellate court observed that because the trial court had not been confronted with a request to exclude the public from the courtroom, it had not been in a position to employ the balancing test set out by this Court in *Press-Enterprise Co. v. Superior Court of California, Riverside County,* 464 U.S. 501 (1984) and *Waller v. Georgia,* 467 U.S. 39 (1984). (16a-17a). Noting that the exclusion of the public was for a short time, that there was no evidence of partiality as to who was prohibited from entering, that the exclusion was only from voir dire and not from the trial itself, that there was a potential for overcrowding, and that the situation was immediately corrected, the court held that the circumstances did not rise to the level of a Sixth Amendment violation. (18a-20a).

On certiorari, the Court of Appeals of Maryland reversed, holding that the Sixth Amendment was violated under the test set out in *Press-Enterprise* and *Waller.* (4a-6a). Although the Court of Appeals recognized that some temporary exclusions of the public could be de minimis, the court found that the exclusion in this case was significant because it involved all members of the public and covered the entire voir dire and jury selection proceedings. (9a). The court was also of the view that under this Court's decision in *Arizona v. Fulminante,* 111 S. Ct. 1246 (1991),

the denial of a public trial could not be deemed harmless error. (9a).

REASONS FOR GRANTING THE WRIT

PRESS-ENTERPRISE AND *WALLER* DO NOT ADEQUATELY ADDRESS CASES INVOLVING MINIMAL, INADVERTENT EXCLUSIONS OF THE PUBLIC, THEREBY CAUSING CONFLICT AMONG THE LOWER COURTS AND PRODUCING UNWARRANTED REVERSALS OF CRIMINAL CONVICTIONS.

Notwithstanding that the closing of the courtroom in this case was accomplished without the trial court's knowledge, that it occurred during a short voir dire, and that the trial itself from opening statements through sentencing was open to the general public, the Maryland high court reversed Watters's conviction. It did so by mechanically applying the test set forth in this Court's *Press-Enterprise* and *Waller* decisions, without thought to the distinctions between those cases and the case at bar. In so doing, the Maryland court erred.

This Court could not have intended that *Press-Enterprise* and *Waller*, both of which address multi-day, complete closures, control the limited, inadvertent closure here. Nevertheless, those courts, like Maryland, that have been confronted with cases involving de minimis and partial closures have struggled to deal with these decisions. The struggle has produced varying and often conflicting results. With this case, the Court can address the recurring issue of how minimal and accidental closures of courtrooms are to be analyzed, and thereby resolve the substantial conflict among the lower courts regarding the applicability of *Press-Enterprise* and *Waller* to such cases.

In *Press-Enterprise,* this Court held that the press and public have a First Amendment right to attend the voir dire stage of a criminal trial. 464 U.S. at 508-10. Four months later, in *Waller,* this Court held that the Sixth Amendment guarantee to a public trial extends to a suppression hearing. 467 U.S. at 47. The closures in these cases were extreme in scope and duration. In both, the closures were complete—all members of the public were excluded—and were at the trial courts' express direction. And, in both, the closures spanned many days. Of the six-week voir dire in *Press-Enterprise,* only three days were open to the public, 464 U.S. at 503; in *Waller,* the entire seven-day suppression hearing was closed, 467 U.S. at 42.[3]

The test developed in *Press-Enterprise* and applied in *Waller* was driven by the peculiar circumstances of those cases: pre-closure hearings where the trial court was called upon to balance competing interests

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[3] *Press-Enterprise* itself was decided on First Amendment grounds and this Court otherwise has never squarely addressed whether the Sixth Amendment public trial right applies to voir dire proceedings. *See Press-Enterprise,* 464 U.S. at 516 (Stevens, J., concurring) (cautioning that the issue whether the "trial" referred to in the Sixth Amendment includes voir dire proceedings is an open question). Notwithstanding *Waller*'s broad pronouncement that "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public," 467 U.S. at 46, significant differences exist between the closure in *Waller* and the one at bar. *Waller* involved a trial-like suppression hearing that occurred after jeopardy had attached. *Id.* at 41, 47. This case involves an essentially non-adversarial voir dire process that occurred before jeopardy attached. Arguably, these distinctions render the Sixth Amendment public trial right inapplicable to voir dire.

and decide, on balance, whether the closures should be permitted. Under this test, the party seeking closure must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, and the trial court must consider reasonable alternatives. *Waller*, 467 U.S. at 48. The test itself suggests its inapplicability to the myriad of less extreme and often inadvertent exclusions of the public that commonly occur at criminal trials.

The poor "fit" of the *Waller* test both to de minimis closures and to those that occur without the trial judge's knowledge has understandably confounded the lower courts. Some courts interpret *Waller* to apply to *any* exclusion of the public, no matter how minimal. For example, in *People v. Harris*, 10 Cal. App. 4th 672, 12 Cal. Rptr. 2d 758, 764-68 (1992), *Waller* was interpreted as requiring reversal merely because most of the attorneys' peremptory strikes were exercised in chambers. Likewise, in *People v. Venters*, 124 A.D.2d 57, 511 N.Y.S.2d 283, 283-85 (1987), the common practice of locking the courtroom doors during the court's jury instructions was held violative of the Sixth Amendment's public trial right.

Other courts have found limited closures not violative of the Sixth Amendment. In so finding, these courts attempt to distinguish *Waller* by fashioning a less stringent standard to be applied when a closure is partial, rather than complete.[4] The Second, Ninth,

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[4] This approach is consistent with those cases decided before *Waller* that viewed limited closures as not violative of the Sixth Amendment public trial right. In *Snyder v. Coiner*, 510 F.2d 224, 230 (4th Cir. 1975), the bailiff's unilateral action in barring

Tenth, and Eleventh Circuits have held that where only part of the public is excluded, the party seeking closure need only show a substantial reason to justify the closure. *See, e.g., Woods v. Kuhlmann,* 977 F.2d 74, 76-78 (2d Cir. 1992) (exclusion of members of the defendant's family for the duration of one witness's testimony, where witness claimed to be frightened, upheld); *United States v. Sherlock,* 962 F.2d 1349, 1356-57 (9th Cir. 1989), *cert. denied sub nom. Charley v. United States,* 113 S. Ct. 419 (1992) (no constitutional violation found where defendants' families were excluded during rape victim's testimony after some of them were observed making faces and laughing); *Nieto v. Sullivan,* 879 F.2d 743, 751-54 (10th Cir.), *cert. denied,* 493 U.S. 957 (1989) (exclusion of defendant's relatives during witness's testimony upheld where witness had previously expressed his fear of the defendant and his family, even though witness

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entry to or exit from the courtroom during the attorneys' arguments to the jury was held "entirely too trivial to amount to a constitutional deprivation." In *United States ex rel. Bruno v. Herold,* 408 F.2d 125, 127 (2d Cir. 1969), *cert. denied,* 397 U.S. 957 (1970), the court held that a "Sixth Amendment situation is not reached" where the trial court cleared the courtroom after a witness suddenly stopped testifying in apparent response to the grins and grimaces of the defendant's associates. *See also Butler v. Smith,* 416 F. Supp. 1151, 1154-55 (S.D.N.Y. 1976) (court's action in clearing public from courtroom during testimony of witness who refused to testify otherwise because of threats on life is not a denial of defendant's right to a public trial where the duration of the exclusion was relatively minimal); *State v. Clark,* 126 Ariz. 428, 616 P.2d 888, 894, *cert. denied,* 449 U.S. 1067 (1980) (sheriff's closure of courtroom for approximately 30 minutes held not violative of the defendant's right to a public trial where the incident was of extremely short duration, was immediately corrected, and did not prejudice defendant).

testified that he was not afraid); *Douglas v. Wainwright,* 739 F.2d 531, 532-33 (11th Cir. 1984), *cert. denied,* 469 U.S. 1208 (1985) (per curiam) (after Supreme Court remand for further consideration in light of *Waller,* court reaffirmed that Sixth Amendment was not violated by the exclusion of all members of the public other than representatives of the press and families of the victim and defendant during the testimony of the State's key witness for the purpose of protecting the witness from embarrassment).

Still other post-*Waller* decisions conclude that minimal exclusions of the public are violative of the Sixth Amendment, but nonetheless are subject to a harmless error analysis. For example, in *State v. Robillard,* 508 A.2d 709, 714-15 (Vt. 1986), the trial judge's practice of locking the courtroom doors during the actual proceedings, and allowing for public access before commencement of the proceedings and during recess periods, was held harmless error. *See also United States v. Acevedo-Ramos,* 842 F.2d 5, 8 (1st Cir. 1988) (fact that a non-public taped deposition was played back at a public trial, if error, was harmless); *People v. Bails,* 413 N.W.2d 709, 710-11 (Mich. App. 1987) (per curiam) (locking doors during jury instructions to prevent interruptions, if error, was harmless). These courts find that de minimis exclusions are harmless error even though this Court in *Waller,* 467 U.S. at 49-50, agreed with the parties that prejudice to the defendant is presumed if the Sixth Amendment public trial right is violated, and despite the Court's recent dictum in *Arizona v. Fulminante,* 111 S. Ct. at 1265, that a violation of the public trial right is not subject to a harmless error analysis. Still other courts, consistent with *Fulminante,* hold that a public

trial violation can never be harmless. *See People v. Harris,* 12 Cal. Rptr. 2d at 767-68; *People v. Jones,* 47 N.Y.2d 409, 391 N.E.2d 1335, 1339-40, *cert. denied,* 444 U.S. 946 (1979). As this Court has yet to decide directly whether the harmless error doctrine is applicable to public trial violations, these contradictory holdings are understandable.

The above analyses are clearly at odds with one another and the resultant confusion necessitates guidance by this Court. Nevertheless, under any analysis, the courtroom closure in the present case should not have led to the reversal of Watters's conviction. Here, the trial judge learned, after the fact, that the courtroom had been closed during voir dire and jury selection. The court took immediate corrective action and opened the proceedings for the trial. Moreover, the closure itself did not undermine the policy central to the public trial right: to safeguard that courts will not become instruments of persecution. *See Gannett Co., Inc. v. DePasquale,* 443 U.S. 368, 380 (1979). The many venirepersons who were released from the case were present during the voir dire process to act as watchdogs and were able later to disseminate information to the rest of the community as to how the jury was selected.

Viewing the totality of the circumstances, Watters was, consistent with the public trial guarantee, "fairly dealt with and not unjustly condemned." *Gannett,* 443 U.S. at 381 (quoting *Estes v. Texas,* 381 U.S. 532, 538-39 (1965)). Where, as here, the goals of a public trial have been met, a partial, temporary closure done without the trial court's knowledge should not lead to the reversal of a valid conviction. Otherwise, the

public trial right becomes an absolute rule disassociated from the policies underlying it.

CONCLUSION

This case gives the Court the opportunity to address those situations in which closure is of a more limited nature than that in *Press-Enterprise* and *Waller* and provide much-needed guidance to the lower courts. For the foregoing reasons, the State of Maryland respectfully requests that the Court issue a writ of certiorari and reverse the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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December 23, 1992

APPENDIX

APPENDIX A

Court of Appeals of Maryland.

No. 134, Sept. Term, 1990.

RONALD GENE WATTERS
v.
STATE OF MARYLAND.

October 2, 1992.

Argued before MURPHY, C.J., and ELDRIDGE, RODOWSKY, McAULIFFE, CHASANOW and CHARLES E. ORTH, Jr., Judge of the Court of Appeals (retired, Specially Assigned), JJ.

Reargued before MURPHY, C.J., and ELDRIDGE, RODOWSKY, McAULIFFE, CHASANOW, ROSALYN B. BELL and CHARLES E. ORTH, Jr., Judge of the Court of Appeals (retired, Specially Assigned), JJ.

McAULIFFE, Judge.

Ronald Gene Watters was convicted in the Circuit Court for Wicomico County of murder in the first degree and related offenses, and was sentenced to life without parole. The Court of Special Appeals affirmed. *Watters v. State*, 84 Md. App. 230, 578 A.2d 810 (1990). We granted Watters' petition for certiorari to consider whether the trial court improperly denied the defendant's motion for a mistrial following exclusion of the public from the voir dire and selection of jurors.

The murder for which Watters was convicted was highly publicized in the Salisbury area. The victim, Lisa Renee

Taylor, had disappeared on her way home from her parents' house. Her body was found months later, badly decomposed, in a wooded lot near Salisbury State University. Because of extensive media coverage given the case at the time the body was discovered and just before trial, voir dire of prospective jurors was somewhat protracted.

Without the knowledge or consent of the trial judge or the parties, a deputy sheriff excluded the public, including members of defendant's family and possibly representatives of the press, from the courtroom during voir dire and jury selection—a process that consumed the entire first morning of trial. Acting on his own, the deputy allowed only prospective jurors, witnesses, and courtroom personnel to enter the courtroom.[1]

After jury selection, and following a luncheon recess during which the defendant learned of the courtroom closure, his counsel moved for a mistrial, claiming that the defendant had been deprived of his Sixth Amendment right to a public trial. He alleged:

> [I]t was brought to my attention during lunch recess that the bailiffs, members of the Wicomico County Sheriff's Office, excluded members of the public from being present in the courtroom this morning during jury selection. Furthermore, it was brought to my attention they excluded members of the news media from being here.

At a hearing on the motion, the deputy who had closed the courtroom testified that he had ordered the exclusion "[b]ecause of the nature of the number of people involved in the case and the courtroom would not handle all the

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[1] It is not clear from the record whether this deputy sheriff ordinarily dealt with matters of courtroom security, or was filling in for Lieutenant Tom Brown of the sheriff's office, who, this deputy explained, was "in charge of courtroom security." Lt. Brown was not available because he had been subpoenaed for jury duty, and was in fact among the venirepersons brought to this courtroom.

persons who wanted to get into the courtroom." The deputy admitted, however, that there were "some seats" available, but he could not estimate how many.[2] Counsel for the defendant proffered his recollection as follows:

> My recollection of the—and I would put testimony from the witness stand in the record from the sheriffs and the bailiffs if necessary—but there was plenty of room on the left-hand side of the courtroom for spectators, members of the news media, to be present. The courtroom was not full, although certain portions of it were full where certain jury panels were seated together.

The prosecutor did not challenge defense counsel's recollection. He stated simply, "I don't know who gave the instructions to close the courtroom."

Defense counsel then produced the testimony of Lillian Trotter, the defendant's mother. Ms. Trotter stated that she, her aunt, and her two sisters arrived at the courthouse at 9:30 a.m., and sought admission to the courtroom. She and her party were denied admission even though she identified herself as the defendant's mother. She was not admitted until 1:30 p.m., following the luncheon recess.

The trial judge denied the motion for mistrial, stating "it was done as a matter of court security because of the crowded conditions of the courtroom, and it is not denying him his right to a public trial."

The defendant argues that the closure did not satisfy the Supreme Court's requirement that any closure must be narrowly tailored and serve an overriding governmental

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[2] Defense counsel asked the deputy "were there three or four rows available of seats?" Unfortunately, the trial judge sustained the prosecutor's objection to this question, notwithstanding that the question represented a legitimate attempt to narrow an earlier inquiry in which the witness was asked to estimate the number of seats available—a question the witness could not answer.

interest. *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L.Ed.2d 31 (1984); *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 104 S. Ct. 819, 78 L.Ed.2d 629 (1984). He contends there was no overriding interest because the deputy admitted there were still seats available, and that it was not narrowly tailored because access could have been limited rather than precluded. The defendant also notes that closure continued for the entire morning of trial, and encompassed the entire voir dire and jury selection process. Moreover, the defendant says, he is entitled to relief for a violation of his right to a public trial without demonstrating specific prejudice. *See Waller v. Georgia*, *supra*, 467 U.S. at 49, 104 S. Ct. at 2217.

The State argues that the standard proposed by the defendant applies only when a court is determining whether to grant a party's motion to close a trial. The State further contends that the appropriate test for this case, where the courtroom was closed by a deputy sheriff without the judge's knowledge, is merely whether the trial court abused its discretion in refusing to grant a mistrial. The State contends the denial of the motion was within the trial judge's discretion because a mistrial need be granted only when there is a manifest necessity due to extreme circumstances. The State urges us, as a reviewing court, to defer to the trial court's determination that there was no manifest necessity in this case. *See Hunt v. State*, 321 Md. 387, 422, 583 A.2d 218 (1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 117, 116 L.Ed.2d 86 (1991); *Johnson v. State*, 303 Md. 487, 516, 495 A.2d 1 (1985), *cert. denied*, 474 U.S. 1093, 106 S. Ct. 868, 88 L.Ed.2d 907 (1986). The State contends that even if the closure here was improper, the error was *de minimus*, and not of constitutional magnitude.

I.

The Supreme Court has ardently protected a criminal defendant's right to a public trial[3] and has addressed the

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[3] That voir dire proceedings are part of a trial for public trial purposes

circumstances which may justify infringement of this right and the standard by which these factors must be balanced. *See Waller v. Georgia*, *supra*, and *Press-Enterprise Co. v. Superior Court of Cal.*, *supra*. The Court in *Press-Enterprise* held that under the First Amendment, a trial could be closed only to protect an overriding governmental interest through a narrowly tailored order. 464 U.S. at 510, 104 S. Ct. at 824. The *Waller* Court noted that the express rights of a defendant under the Sixth Amendment were at least as extensive as the implied rights of the public and press under the First Amendment, and thus applied the same test to a Sixth Amendment challenge to closure. 467 U.S. at 46, 104 S. Ct. at 2215. Under present law, therefore, whether objection to closure is made by the defendant or the press, the public may only be constitutionally excluded from a trial, including voir dire, pursuant to a narrowly tailored order necessary to protect an overriding state interest.

The circumstances at this trial did not present a compelling need for excluding members of the defendant's family as well as the press and the public. The record, although lacking in desirable particulars, establishes that there were seats available during the voir dire and jury selection.

Moreover, even if the State could show that under the circumstances then prevailing the government had a legitimate interest in preventing overcrowding, it could not show that the exclusion of all persons was a narrowly tailored means of protecting that interest. There was no

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was established by the Supreme Court in *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 509-10, 104 S. Ct. 819, 823-24, 78 L.Ed.2d 629 (1984). Maryland cases have also demonstrated this Court's attention to a defendant's trial rights at the voir dire stage. *See, e.g.*, *Bedford v. State*, 317 Md. 659, 672, 566 A.2d 111 (1989) ("At the very least, the defendant must be allowed to be present at trial. This right includes the voir dire."); *Noble v. State*, 293 Md. 549, 446 A.2d 844 (1982) (defendant must waive right to be present at each stage of trial, including voir dire).

effort to ensure that petitioner's family could be present while the jury was selected, nor was there apparently any effort to admit representatives of the press. There was not even an attempt to fill the remaining seats impartially. Rather, after the venirepersons and witnesses had taken their places, the empty seats were left vacant, notwithstanding the early arrival of the defendant's family members and their request for admission. The closure of the courtroom under these circumstances violated the defendant's Sixth Amendment right to a public trial.

II.

The defendant, relying on *Waller v. Georgia*, *supra*, argues that he is entitled to a new trial on the basis of this violation because he is not required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee. The State answers that it would be absurd to require a new trial for every accidental, technical violation of a defendant's Sixth Amendment right to a public trial, and that where the violation is *de minimus* a new trial should not be required. Put another way, the State says that not every closure is of constitutional dimension.

Each argument has merit. Our task, therefore, is to determine whether the violation in this case may properly be classified as *de minimus* and undeserving of constitutional protection, or as a significant violation of the Sixth Amendment carrying with it a presumption of prejudice to the defendant and therefore requiring the granting of appropriate relief.

In *Press-Enterprise*, the Supreme Court recognized the historically public character of the jury selection process, noting that it "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." 464 U.S. at 508, 104 S. Ct. at 823 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-71, 100 S. Ct. 2814, 2823-24, 65

L.Ed.2d 973 (1980)). Although *Press-Enterprise* was decided on the basis of a First Amendment challenge to a trial closure, and thus primarily addressed the harm to the press and public, the harm to a defendant resulting from a closed trial was recognized in *Waller*:

> The central aim of a criminal proceeding must be to try the accused fairly, and "[o]ur cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant."

Waller v. Georgia, supra, 467 U.S. at 46, 104 S. Ct. at 2215 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 380, 99 S. Ct. 2898, 2905, 61 L.Ed.2d 608 (1979)). With respect to the more concrete benefits to the defendant of a public trial, the *Waller* Court observed that "[i]n addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury." 467 U.S. at 46, 104 S. Ct. at 2215.

The Supreme Court recognized that although these "benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real." *Id.* at 49, n. 9, 104 S. Ct. at 2217, n. 9. Consequently, the *Waller* Court agreed that "the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee."[4] *Id.* at 49, 104 S. Ct. at 2217. The Court left little room for doubt concerning the mandatory nature of the presumption of prejudice to be applied

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[4] The *Waller* Court did not conclude that an improperly closed suppression hearing entitled the defendant to a new trial; rather, the Supreme Court stated that "the remedy should be appropriate to the violation," 467 U.S. at 50, 104 S. Ct. at 2217, and ordered a new, public suppression hearing, with a new trial to follow only if the public hearing resulted in different suppression rulings. Clearly, no such limited relief is available where the public-trial guarantee was violated during jury selection and trial has been concluded.

when a violation of the Sixth Amendment right to a public trial has been shown:

> The general view appears to be that of the Court of Appeals for the Third Circuit. It noted in an en banc opinion that a requirement that prejudice be shown "would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury." *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 608 (1969). While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real. See also *State v. Shepard*, 182 Conn. 412, 418, 438 A.2d 125, 128 (1980) ("Because demonstration of prejudice in this kind of case is a practical impossibility, prejudice must necessarily be implied"); *People v. Jones*, 47 N.Y.2d 409, 416, [418 N.Y.S.2d 359, 364] 391 N.E.2d 1335, 1340 (1979) ("The harmless error rule is no way to gauge the great, though intangible, societal loss that flows" from closing courthouse doors).

Waller v. Georgia, supra, 467 U.S. at 49, n.9, 104 S. Ct. at 2217, n. 9 (brackets in original). The Third Circuit had elaborated:

> Indeed, the barring of spectators would make it impossible for the unknown individual to stray into the courtroom and reveal his information bearing on the case. To require proof of this by the defendant would be ironically to enforce against him the necessity to prove what the disregard of his constitutional right has made it impossible for him to learn.

United States ex rel. Bennett v. Rundle, 419 F.2d 599, 608 (3d Cir. 1969).

Although the Supreme Court has recently held that a trial error even as potentially critical as the admission of an involuntary confession is subject to harmless error analysis, it has not retreated from the view that the deprivation of the constitutional right to a public trial cannot be harmless error. *Arizona v. Fulminante*, ___ U.S. ___, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991). The Court noted that denial of a public trial is a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.*, ___ U.S. at ___, 111 S. Ct. at 1265.

Along with the general detriments associated with a closed trial, notably the inability of the public to judge for itself and to reinforce by its presence the fairness of the process, the present case demonstrates other kinds of harms: the inability of the defendant's family to contribute their knowledge or insight to the jury selection and the inability of the venirepersons to see the interested individuals. The Third Circuit has suggested the importance of the former by noting that anyone should be free to view the proceedings and "reveal his information bearing on the case." *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 608 (3d Cir. 1969).

The scope of the closure in this case was substantial. The courtroom was open only to court personnel, the venirepersons, and witnesses. All other members of the public, including members of the defendant's family and the press, were barred. The closure extended over a significant period of time—an entire morning of trial during which the voir dire and selection and swearing of the jury were accomplished. Although we agree with the State that not every technical violation of the Sixth Amendment right of open trial requires a new proceeding or trial, we would be hard pressed to declare a violation of this magnitude *de minimus*, or otherwise not of constitutional significance. We conclude that this violation of the defendant's Sixth Amendment right carries with it the presumption of spe-

cific prejudice mandated by *Waller*, and thus requires the granting of appropriate relief. Under the particular facts of this case, that relief is necessarily the granting of a new trial.

III.

Finally, the State argues that even if there was a violation of constitutional magnitude which, if committed by a judicial officer would ordinarily require the granting of a new trial, that principle is not applicable to this case. The State offers two reasons in support of this argument: the error was committed by a deputy sheriff acting without knowledge of the court; and, because the error was brought to the attention of the court only after it had occurred, by means of a motion for mistrial, the scope of appellate review must be very generous in favor of upholding the decision of the trial judge made in the exercise of the wide discretion granted him in such matters. We find the argument unpersuasive.

That the defendant was denied a constitutional right by a State official other than the judge is of little moment.[5] In *Parker v. Gladden*, 385 U.S. 363, 87 S. Ct. 468, 17 L.Ed.2d 420 (1966), the Supreme Court ordered a new

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[5] We observe, for the benefit of trial judges in future cases, that the trial judge controls the courtroom. Whether and to what extent a courtroom must be closed is a decision exclusively within the domain of the trial judge. He or she may and should consult with the authorities providing security, but the final decision must be made by the trial judge after carefully weighing and balancing security or other interests against the right of a defendant to a fair trial and the right of the public and the defendant to an open trial. Closure, or unusual security measures that threaten the defendant's right to a fair trial, should be permitted only when supported by a compelling interest and backed up by a record clearly disclosing the factual basis and reasons for the action taken. *See generally Baltimore Sun v. Colbert*, 323 Md. 290, 593 A.2d 224 (1991); *Hunt v. State*, 321 Md. 387, 407-14, 583 A.2d 218 (1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 117, 116 L.Ed.2d 86 (1991).

trial because of prejudicial statements made by a bailiff to jurors during deliberation, holding that "the statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment." *Id.* at 364, 87 S. Ct. at 470. Nor does the fact that the violation was brought to the attention of the court by way of a motion for a mistrial change the result. It is true that ordinarily the decision of whether to grant a motion for a mistrial rests within the discretion of the trial judge. *Kosmas v. State*, 316 Md. 587, 594, 560 A.2d 1137 (1989); *Wilhelm v. State*, 272 Md. 404, 429, 326 A.2d 707 (1974). That discretion is often quite broad because a trial judge is ordinarily in a uniquely superior position to gauge the potential for prejudice in a particular case, and therefore to determine whether a mistrial is appropriate or required. Occasionally, the prejudice will be manifest and the mistrial must be granted. *Kosmas*, *supra*, 316 Md. at 594-98, 560 A.2d 1137. Here, as we have noted, the constitutional violation was significant and prejudice to the defendant was presumed. Under these circumstances, there was but one decision that could be made—the defendant was entitled to the mistrial he sought.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED; CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AND TO REMAND THE CASE TO THAT COURT FOR A NEW TRIAL; COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY WICOMICO COUNTY.

APPENDIX B

Court of Special Appeals of Maryland

No. 1685, Sept.-Term, 1989.

RONALD GENE WATTERS

v.

STATE OF MARYLAND.

September 4, 1990.

Argued before BISHOP, ROSALYN B. BELL and WENNER, JJ.

ROSALYN B. BELL, Judge.

Ronald Gene Watters was convicted by a jury in the Circuit Court for Wicomico County, of first degree murder, assault with intent to murder, and assault and battery. He was sentenced to life imprisonment without the possibility of parole for the murder conviction. The other convictions were merged. On appeal Watters contends that the trial court erred:

—in denying his motion for mistrial, and

—in refusing his motion to suppress certain statements.

We conclude no error occurred.

FACTS

On the evening of June 7, 1988, Lisa Taylor stopped at her parents' house after work to pick up some checks for her college tuition. After a short visit, she left to return to her apartment. Two days later, it was discovered that Taylor had never returned to her home. More than three months later, a badly decomposed body was found in a wooded area near the campus of Salisbury State Univer-

sity. A comparison of dental records revealed that the body was that of Lisa Taylor. Dr. Margarita Korell testified that the cause of death was by an obstruction of the airway as a result of a smock forced into the larynx and pharynx area of the throat. The police had no suspects and developed no leads in solving the homicide.

On December 1, 1988, however, Watters, while being held at the Wicomico County Detention Center on unrelated charges, asked to speak to the police. In a series of interviews with the police, Watters made statements implicating himself in the Taylor homicide. Watters was subsequently charged with various offenses stemming from the murder of Taylor.

MISTRIAL

Appellant complains that he was denied his Sixth Amendment right to a public trial as a consequence of the denial of public access to voir dire proceedings. Hence, he concludes that the trial court erred in not granting his motion for a mistrial.

After returning from a lunch recess on the first day of trial, defense counsel alerted the court that he would move for a mistrial. Counsel had learned that, during the morning proceedings at the time prospective veniremen were being voir dired, members of the sheriff's department had unilaterally excluded members of the public from the courtroom. This included members of appellant's family and members of the news media.

The court then allowed the examination of T.A. Phillips, the deputy sheriff. The following exchange took place:

"BY [APPELLANT'S COUNSEL]:

* * *

"Q Okay. Were you authorized or instructed to keep spectators, members of the public and/or news media outside the courtroom?

"A No, sir.

"Q Are you aware that that was followed?

"A Yes, sir, it was.

"Q And by who was that followed?

"A By myself.

"Q You say no one instructed you, is that correct?

"A No, sir.

"Q You took it upon your own to exclude spectators and members of the news media?

"A Yes, sir.

* * *

"Q Who was excluded, to your knowledge?

"A The only persons allowed in the courtroom were those on jury duty and those as witnesses in the trial pending before the Court.

"Q Are you aware of how many civilian spectators, members of the public, news media personnel attempted to gain entrance into the courtroom this morning for the proceedings?

"A No, sir.

"Q Again, on whose authority did you exclude members of the public and members of the media?

"A On my own.

"Q And what authority did you have to do that?

"A Just my own.

"THE COURT: He is in charge of courtroom security.

"BY [APPELLANT'S COUNSEL]:

"Q Did you ask the advice or consent of either myself, [the Assistant State's Attorney], or the administrative judge of the Circuit Court for [Wicomico] County before you made that decision?

"A No, sir."

Appellant's counsel then asked Phillips what instructions he had given the deputy who had screened entrance into the courtroom. This colloquy occurred:

* * *

"THE WITNESS: To allow only jurors and witnesses in the case to enter the courtroom.

"BY [APPELLANT'S COUNSEL]:

"Q Did you instruct him as to why?

"A Because of the nature of the number of people involved in the case and the courtroom would not handle all the persons who wanted to get into the courtroom.

"Q Now, the courtroom, every seat in the courtroom was not filled this morning, is that correct?

"A There were some seats.

"Q Can you estimate for us how many you believe were available?

"A No, sir, I can't."

On cross-examination, the State asked:

"Q Deputy Phillips, very briefly, the individuals you asked not to come into the courtroom, to the best of your knowledge were they on both sides of the case, spectators for both sides, as opposed to either the defense or the state?

"A I have no way of knowing that.

"Q It was an across-the-board type of thing, is that correct?

"A Yes, sir.

"Q I have nothing further, Your Honor."

Appellant's mother then testified that she and other family members were denied access into the courtroom that morning. Appellant renewed his motion for a mistrial and the court ruled:

> "It was done as a matter of Court security because of the crowded conditions of the courtroom, and it is not denying him his right to a public trial. The motion is denied."

In support of their respective positions, both the State and appellant rely on *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 104 S. Ct. 819, 78 L.Ed.2d 629 (1984), which held that the guarantees of open public proceedings in criminal trials cover the voir dire proceedings. In addressing this question, the United States Supreme Court focused on First Amendment values. *Press-Enterprise Co.*, 464 U.S. at 509 n.8, 104 S. Ct. at 823 n. 8.[1]

Unlike *Press-Enterprise Co.*, the question we have before us focuses on the Sixth Amendment, rather than the First Amendment. In *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L.Ed.2d 31 (1984), however, the United States Supreme Court noted that "there can be little doubt

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[1] The Sixth Amendment right to a public trial has been held to include the impaneling of the jury. *See e.g., United States v. Sorrentino*, 175 F.2d 721, 722 (3d Cir.) *cert. denied*, 338 U.S. 868, 70 S. Ct. 143, 94 L.Ed. 532, *rehearing denied*, 338 U.S. 896, 70 S. Ct. 238, 94 L.Ed. 551 (1949); *State v. Lawrence*, 167 N.W.2d 912, 915 (Iowa 1969); *State v. Pullen*, 266 A.2d 222, 228 (Me. 1970), *overruled on other grounds*, *State v. Brewer*, 505 A.2d 774 (Me. 1985).

that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Waller*, 467 U.S. at 46, 104 S. Ct. at 2215. The Court went on to say:

> "Under *Press-Enterprise*, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."

Waller, 467 U.S. at 48, 104 S. Ct. at 2216.

The problem here is that no request was made by either party to exclude the public from the courtroom. Hence, the trial judge was not confronted with balancing an overriding interest against the right to public access or given an opportunity to consider alternatives. Instead, he was faced with a determination of whether the unilateral actions of the sheriff rose to the level of a constitutional deprivation.

Although we have never addressed this precise issue, some of our sister jurisdictions, when confronted with similar circumstances, have held that the defendant's right to a public trial was not denied. In *State v. Brooks*, 92 Mo. 542, 5 S.W. 257, 330 (1887), *error dismissed*, 124 U.S. 394, 8 S. Ct. 443, 31 L.Ed. 454 (1888), *overruled on other grounds*, *State v. Imboden*, 157 Mo. 83, 57 S.W. 536 (1900), *overruled on other grounds*, *State v. Hathhorn*, 65 S.W. 756 (1901), two men stationed at the entrance of the courtroom refused to admit anyone into the courtroom except jurors, witnesses and officers of the court during the impaneling of the jury. The exclusion only continued through the afternoon of one day and the morning of the next day. When the matter was brought to the court's attention, it stated that no order had been made stationing men

at the door and then announced that anyone who wished to come into the courtroom could do so until the seats were filled. On appeal, no violation of the defendant's right to a public trial was found. *Brooks*, 5 S.W. at 263-64.

Similarly, in *Snyder v. Coiner*, 510 F.2d 224 (4th Cir. 1975), the bailiff refused to allow persons to enter or leave the courtroom during counsels' arguments to the jury. The exclusion lasted a short time and was changed by the trial judge when advised of the bailiff's actions. The Fourth Circuit stated that the incident was "entirely too trivial to amount to a constitutional deprivation." *Snyder*, 510 F.2d at 230.

In *Commonwealth v. Burton*, 459 Pa. 550, 330 A.2d 833 (1975), the district attorney, without the trial court's knowledge, requested court personnel to keep the defendant's wife and all members of the Black Panthers out of the courtroom during the testimony of a witness. Pursuant to the district attorney's request, other members of the defendant's family were also accidentally excluded. When the defendant's counsel became aware of what occurred, he moved for a mistrial, claiming that the defendant was deprived of his right to a public trial. After the trial judge was made aware of the situation, he ratified the district attorney's action, excluding the defendant's wife and the Black Panthers. He did, however, permit the admission of the rest of the defendant's family. The Supreme Court of Pennsylvania held that under those circumstances the defendant was not denied the right to a public trial. *Burton*, 330 A.2d at 837.

We find these cases persuasive in the resolution of the question which appellant presents. As in the above cases, the exclusion of the public in the instant case was for a short time. In addition, there was no evidence of favoritism or partiality as to who was prohibited from entering. Moreover, as far as we can determine, the public was not excluded from the trial itself, but only from the voir dire

proceeding. In view of the intense publicity surrounding the trial, access to the courtroom undoubtedly raised the potential of overcrowding. In light of this potential, Phillips took it upon himself as head of security to limit entry into the courtroom to only prospective jurors and witnesses. Although this type of unilateral action by the sheriff is not appropriate, we do not find that appellant was denied his Sixth Amendment right of a public trial by this action. We explain.

The requirement of a public trial benefits the accused in that the public may see that the defendant is dealt with fairly, thus avoiding the appearance of a "Star Chamber" proceeding. *Dutton v. State*, 123 Md. 373, 387-88, 91 A. 417 (1914). This right of a public trial, however, is subject to the trial judge's discretion to exclude members of the public from the trial where no prejudice to the accused results. *Dutton*, 123 Md. at 387, 91 A. 417; *Cox v. State*, 3 Md. App. 136, 139-40, 238 A.2d 157 (1968). But an accused who invokes the constitutional guarantee of a public trial should not be required to prove specific prejudice in order to show a violation of the public trial right. *Waller*, 467 U.S. at 49-50, 104 S. Ct. at 2217, and cases cited therein. *See also* Annotation, *Exclusion of Public During Criminal Trial*, 48 A.L.R.2d 1436, 1454 (1956). This is so because it would be difficult, if not impossible, for the accused to point to any specific injury. *United States v. Kobli*, 172 F.2d 919, 921 (3d Cir. 1949). To require the accused to prove specific prejudice would, ironically, impose the necessity to prove what the disregard of one's constitutional right has made it impossible to learn. *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 608 (3d Cir. 1969). We agree with and thus adopt this view. With these precepts in mind, we proceed to examine appellant's claim of error.

Ordinarily, in a criminal case, the trial judge may exclude persons having no connection with the trial to the extent such exclusion is necessary to prevent overcrowd-

ing. *See* Annotation, 48 A.L.R.2d at 1449; Annotation, *Exclusion of Public from State Criminal Trial in Order to Prevent Disturbance by Spectators or Defendant*, 55 A.L.R. 4th 1170, 1176 (1987).

In this case, the exclusion of the public should have been brought to the trial judge's attention prior to the voir dire. He found, however, that the potential for overcrowding was present and this justified the temporary exclusion since no reasonable alternative existed. We cannot hold that the trial judge abused his discretion in finding that the circumstances presented did not rise to a level that constituted a denial of appellant's Sixth Amendment rights. The exclusion of the public was of short duration and was corrected when the trial judge became aware of the situation.

The fact that appellant's family was excluded along with others during the voir dire does not alter our opinion. Although the accused is generally entitled to have his or her family present in the courtroom, *In re Oliver*, 333 U.S. 257, 271-72, 68 S. Ct. 499, 506-07, 92 L.Ed. 682 (1948), under the circumstances presented here, we cannot say that their exclusion warranted a mistrial. As was previously mentioned, the exclusion was nondiscriminatory in application and short in duration. Moreover, the family was permitted to enter once the trial judge was informed of what occurred.

The decision to grant or deny a mistrial is within the sound discretion of the court and the motion should not be granted except under extraordinary circumstances and where there is a manifest necessity. *Russell v. State*, 69 Md. App. 554, 562, 518 A.2d 1081 (1987). We perceive no manifest necessity for a mistrial under the circumstances in the instant case.

SUPPRESSION

Appellant contends that the trial court erred in denying his motion to suppress his inculpatory statements. He

claims that his statements were neither voluntarily nor intelligently and knowingly made.

He presents two arguments in support of this contention. First, he argues that although he asserted his Sixth Amendment right to counsel before making the statements, he was denied access to his attorney. Secondly, he argues that he was induced to confess.

In accordance with *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L.Ed.2d 694 (1966), a person subjected to custodial police interrogation must be advised of his or her right to counsel. If the accused requests the presence of counsel, no further interrogation is allowed until counsel is made available. *Miranda*, 384 U.S. at 444-45, 86 S. Ct. at 1612-13; *see also Bryant v. State*, 49 Md. App. 272, 277, 431 A.2d 714, *cert. denied*, 291 Md. 772, 782 (1981), *cert. denied*, 456 U.S. 949, 102 S. Ct. 2020, 72 L.Ed.2d 474 (1982).

Here, the trial court found and the record corroborates that appellant initiated the contact and conversations with the police regarding information on the Taylor homicide. In *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612, the United States Supreme Court defined "custodial interrogation" as questioning initiated by law enforcement officers. Since appellant sought the discussion, he was not entitled to *Miranda*'s protection.

Even if he were, the record reflects that appellant was repeatedly informed of and understood his right to counsel before any statements were taken. Detective Roberts of the Wicomico County Sheriff's Department and Trooper Roberts of the Maryland State Police advised appellant of his *Miranda* rights and obtained his signature on a waiver form at the State police barracks in Salisbury after his December 1 request to talk to them. At that time, no specific questions were asked of appellant regarding the homicide as appellant asked to be returned to his cell at the Detention Center. After returning to the Detention

Center, appellant again requested to talk to Detective Roberts. Appellant was transported back to the State police barracks where he was advised of his *Miranda* rights by Trooper Roberts and Detective Roberts. Detective Roberts tape recorded the reading of appellant's constitutional rights, including his right to the advise of counsel. Appellant indicated that he understood his rights and signed the waiver form.

On December 2 and 6, 1988, Corporal Collins, the State police polygraph examiner, testified that he advised appellant of his constitutional rights before administering a polygraph test. Appellant advised Collins that he understood his rights and signed the waiver form. At no time during any of these interviews did appellant indicate any desire to obtain or speak to an attorney. Hence, we find no merit to appellant's argument.

Appellant next argues that his statements were involuntary since the police made false promises to induce him to confess. Specifically, he alleges that Detective Roberts and Trooper Roberts indicated that they would help him in getting released from jail if he helped the police in solving the Taylor case. Both officers, however, related that at no time were any promises made regarding leniency with respect to the Taylor homicide or other charges facing appellant. Corporal Collins also averred that no promises or inducements were made in his presence to try to get appellant to make a statement.

In addition, the tape recorded interview of appellant on December 1, 1988 corroborates the officers' testimony. On the tape, Detective Roberts said to appellant:

> "You want to get out of jail. You know we can't make any promises, okay? You know that. We don't make any deals, no promises, and we haven't made you any deals or promises."

Appellant responded affirmatively. The tape further revealed the following exchange between Detective Roberts and appellant:

> "Question: You are looking for some kind of deal, is that what you are—okay, we can't make you any deals or promises and we can't make you nothing. If there is more you want to tell us, we are here to listen, but we can't make any deals or promises.
>
> "Answer: That is the whole point.
>
> "Question: We are not in the position that we can make the deals, [appellant].
>
> "Answer: I know. I know you—I know.
>
> "Question: The State's Attorney is the only—is the only one that can do anything like that. We can't do that."

Reading from the transcript of the taped interview, Detective Roberts further reported:

> "And on page 29, [appellant] says I know, I understand that you ain't in that position. You know it is just like you to say—you know, it is just like you—it is just like you say, it is more I want to tell you, but I just want to get out first.
>
> "The next question is well, [appellant], I am telling you—what I am telling you is that I can't promise that you are going to walk out of jail, okay? Neither one of us can promise you that. I just can't do that, man, I can't promise you that you are going to walk out of that jail, all right? I am giving you the opportunity to tell us what you know, to tell us what you know. I can't say whether that is going to help you, I can't say it is not going to help you, because I am not in that position."

Based on the testimony elicited at the suppression hearing, the motions judge simply did not believe appellant and

concluded that the statements were made voluntarily. We cannot say this ruling was clearly erroneous. Rule 8-131(c).

In *Pharr v. State*, 36 Md.App. 615, 628, 375 A.2d 1129, *cert. denied*, 281 Md. 742 (1977), we stated that the State must prove that the confession was made voluntarily and not the product of force, threats, promises, or inducements. We added that to be voluntary a statement cannot be extracted by any direct or implied promises, however slight, nor by the exertion of any improper influence. *Pharr*, 36 Md.App. at 628, 375 A.2d 1129. Here, the trial court determined that the State established by a preponderance of the evidence that there were no inducements and found that the statements were voluntary. Our independent and reflective review of the record supports that finding and we do not conclude it to be clearly erroneous. We perceive no error.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

Supreme Court, U.S.
FILED
MAR 12 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NO. 92-1104

STATE OF MARYLAND,

Petitioner

v.

RONALD GENE WATTERS,

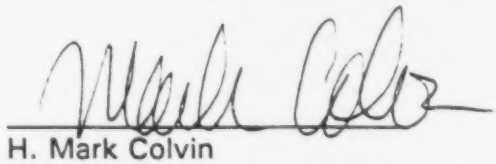
Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

**MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS**

The Respondent, Ronald Gene Watters, who is indigent and who has been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, asks leave to file the attached Brief in Oppositiion without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39.

The Respondent's Affidavit in support of this Motion is attached hereto.



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Office of the Public Defender
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(410) 333-2750

Counsel for Respondent

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NO. 92-1104

STATE OF MARYLAND,

Petitioner

v.

RONALD GENE WATTERS,

Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Ronald Gene Watters, being duly sworn, depose and say that I am the Respondent in the above-entitled case; that I am unable to pay the costs of said proceeding, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are you presently employed?

NO

(a) If the answer is *yes*, state the amount of your salary or wages per month and give the name and address of your employer.

N/A

(b) If the answer is *no*, state the date of your last employment and the amount of the salary and wages per month which you received.

JUNE 1984 - J+J INSULATION CO - APPROXIMATELY $400 PER MONTH

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment or in the form of rent payments, interest, dividends, or other source?

ONLY MONY FROM FAMILY

(a) If the answer is *yes*, describe each source of income and state the amount received from each during the past twelve months.

APPROXIMATELY $100 FROM FAMILY

3. Do you own any cash or checking or savings accounts?

N/C

4

Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

N/C

(a) If the answer is *yes*, describe the property and state its approximate value.

N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons.

LILLIAN THETHER - MOTHER

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Ronald Gene Watters

Ronald Gene Watters

Subscribed and sworn to before me, a Notary Public, this 7th day of March, 1993.

Mary F. Bryant
NOTARY PUBLIC

My Commission Expires: 2-14-1996

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefore.

_____
JUSTICE

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NO. 92-1104

STATE OF MARYLAND,

Petitioner

v.

RONALD GENE WATTERS,

Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Stephen E. Harris
Public Defender

H. Mark Colvin*
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QUESTION PRESENTED

Did the exclusion of the general public from the courtroom during the voir dire of prospective jurors deny Respondent his Sixth Amendment right to a public trial?

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STATEMENT OF THE CASE

At the hearing on Respondent's motion for a mistrial, defense counsel proffered as follows:

> My recollection of the -- and I would put testimony from the witness stand in the record from the sheriffs and the bailiffs if necessary -- but there was plenty of room on the left-hand side of the courtroom for spectators, members of the news media, to be present. The courtroom was not full, although certain portions of it were full where certain jury panels were seated together. (3a)

As the Court of Appeals of Maryland observed, "the prosecutor did not challenge defense counsel's recollection." (3a)

When defense counsel sought to establish how many seats were "some seats," the trial judge sustained the prosecutor's objection to further

questioning of the deputy sheriff notwithstanding as the Court of Appeals of Maryland observed "that the question represented a legitimate attempt to narrow an earlier inquiry in which the witness was asked to estimate the number of seats available - a question the witness could not answer."(3a)

At the conclusion of the hearing, the trial judge, without even making the requisite factual finding, simply deferred to the decision of the deputy sheriff, stating: "It was done as a matter of Court security because of the crowded conditions of the courtroom, and it is not denying him his right to a public trial."(3a)

In holding that "under these circumstances, there was but one decision that could be made -- the defendant was entitled to the mistrial he sought", a unanimous Court of Appeals of Maryland found that the exclusion of the public, including all the members of Respondent's family, from the "somewhat protracted" jury selection process in a "highly publicized" murder case with "extensive media coverage" was of "constitutional significance" and could not, therefore, be deemed harmless error. (1a-2a)

SUMMARY OF ARGUMENTS

I. Voir dire proceedings are part of a trial for public trial purposes. Voir dire proceedings may be closed only to protect an overriding governmental interest through a narrowly tailored order. Since the record in this case establishes that there were "some seats" available throughout the voir dire proceedings and there was no compelling need for excluding members of the general public, the closure of the courtroom during the entire jury selection process violated Respondent's right to a public trial.

II. Since the exclusion of the general public, including members of Respondent's family, from the protracted jury selection process in a highly publicized murder case was of "constitutional significance," the trial judge should have granted Respondent's motion for a mistrial.

REASONS FOR DENYING THE WRIT

THE EXCLUSION OF THE GENERAL PUBLIC FROM THE COURTROOM DURING THE VOIR DIRE OF PROSPECTIVE JURORS DENIED RESPONDENT HIS SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL.

I.

In its petition for writ of certiorari, the State of Maryland contends that the Court of Appeals of Maryland reversed Respondent's conviction "by mechanically applying the test set forth in this Court's Press-Enterprise [Co. v. Superior Court of California, Riverside County, 464 U.S. 501 (1984)] and Waller [v. Georgia, 467 U.S. 39 (1984)] decisions, without thought to the distinctions between those cases and the case at bar." Petition at 6. Even a cursory review of the opinion of the Court of Appeals demonstrates that this contention is devoid of merit.

A unanimous Court of Appeals reversed Respondent's conviction because "under these circumstances, there was but one decision that could be made - the defendant was entitled to the mistrial he sought." (11a) The voir dire proceedings were a part of Respondent's trial for public trial purposes. Press-Enterprise Co., 464 U.S. at 509-10. See e.g. United States v. Sorrentino, 175 F.2d 721, 722 (3d Cir.), cert. denied, 338 U.S. 868, 70 S.Ct. 143, 94 L.Ed 532, rehearing denied, 338 U.S. 896, 70 S.Ct. 238, 94 L.Ed.

551 (1949); State v. Lawrence, 167 N.W.2d 912, 915 (Iowa 1969); State v. Pullen, 266 A.2d 222, 228 (Me. 1970) overruled on other grounds, State v. Brewer, 505 A.2d 774 (Me. 1985).[1] The voir dire proceedings should not have been closed to the public. Id. When the closure was called to the trial judge's attention, the trial judge should have determined on the record whether there was an overriding need to limit access to the courtroom to prevent overcrowding and whether the deputy sheriff had narrowly tailored the means of protecting that interest. The trial judge, however, failed to make the requisite determination. He simply deferred to the decision of a deputy sheriff. As the Court of Appeals correctly concluded:

> The circumstances at this trial did not present a compelling need for excluding members of the defendant's family as well as the press and the public. The record, although lacking in desirable particulars,[2] establishes that there were seats available during the voir dire and jury selection.
>
> Moreover, even if the State could show that under the circumstances then prevailing the government had a legitimate interest in preventing overcrowding, it could not show that the exclusion of all persons was a narrowly tailored means of protecting that interest. There was no effort to ensure that petitioner's family could be present while the jury was selected,nor was there apparently any effort to admit representatives of the press. There was not even an attempt to fill the remaining seats impartially. Rather, after the venirepersons and witnesses had taken their places, the empty seats were left vacant, notwithstanding the early arrival of the defendant's family members and their request for admission. The closure of the courtroom under these circumstances violated the defendant's

[1]Petitioner is unable to cite any authority for the proposition that the Sixth Amendment public trial right does not apply to voir dire proceedings.

[2]As previously noted, the trial judge "unfortunately" sustained the prosecution's objection when the defense counsel asked the deputy sheriff "were three or four rows of seats available in the courtroom?"(3a)

Sixth Amendment right to public trial.

II.

In its petition for writ of certiorari, the State of Maryland contends that the closure in this case was de minimus. The State then relies upon several cases that have found limited closures not violative of the Sixth Amendment. These cases are clearly inapposite.[3] The closure in this case was not de minimus; the closure was substantial. The closure carried with it a presumption of prejudice. As the Court of Appeals of Maryland observed:

> . . . The courtroom was open only to court personnel, the venirepersons, and witnesses. All other members of the public, including members of the defendant's family and the press, were barred. The closure extended over a significant period of time -- an entire morning of trial during which the voir dire and selection and swearing of the jury were accomplished.[4] Although we agree with the State that not every technical violation of the Sixth Amendment right of open trial requires a new proceeding or trial, we would be hard pressed to declare a violation of this magnitude de minimus, or otherwise not of constitutional significance.(9)

In reversing Respondent's conviction, the Court of Appeals of Maryland simply applied the Press-Enterprise test to the unique facts of this case and held, as a matter of state law, that the trial judge abused his discretion in denying Respondent's motion for a mistrial.

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[3]There is, in other words, no real conflict among the state and lower federal courts on the issue of excluding the public from voir dire proceedings.

[4]By Maryland standards, the voir dire of prospective jurors was "somewhat protracted." The proceedings lasted half a day. The public was excluded from the entire jury selection process. Given the extensive publicity surrounding this murder trial, eighty-one of a total of ninety-six venirepersons answered questions during voir dire. The voir dire proceeding were far from routine.

CONCLUSION

The petition for writ of certiorari filed by the State of Maryland should be denied, as the State of Maryland has failed to demonstrate that review of the opinion of the Court of Appeals of Maryland is necessary or desirable.

Respectfully submitted,

Stephen E. Harris
Public Defender

H. Mark Colvin*
Arthur A. DeLano, Jr.
Assistant Public Defenders

Counsel for the Respondent

*Counsel of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of March, 1993, a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and Brief in Opposition to Petition for Writ of Certiorari were delivered to Gary E. Bair, Assistant Attorney General for the State of Maryland, 200 St. Paul Place, Baltimore, Maryland 21202.

Mark Colvin

H. Mark Colvin
Assistant Public Defender